

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AUBREY MALCOLM MUNROE,
Petitioner

CIVIL ACTION

v.

JOHN ASHCROFT, As Attorney
General of the United States
of America,

Respondent

NO. 02-2256

MEMORANDUM AND ORDER

McLaughlin, J.

January 16, 2003

The petitioner, an alien, was convicted of two counts of theft **by** deception and was sentenced to pay restitution in the amount of \$10,500.00, for the first count, and \$1,022.00, for the second count. Pursuant to 8 U.S.C. § 101(a) (43)(M)(i), the petitioner was found to be deportable by an immigration judge. Under 8 U.S.C. § 101(a) (43)(M)(i), an alien is deportable if he commits an aggravated felony, which includes a felony involving fraud or deceit in which the loss to the victim(s) exceeds \$10,000.00.

While his appeal to the Board of Immigration Appeals was pending, the petitioner applied to the New Jersey trial court to reduce the total amount of restitution in his sentence. This application was approved on December 1, 2000, and pursuant to a stipulation between the prosecutor and the petitioner, the restitution was amended and reduced to \$9,999.00.

The Board of Immigration Appeals, however, found this change to be irrelevant in determining whether or not the petitioner had been convicted of an aggravated felony and upheld the decision that the petitioner was deportable under 8 U.S.C. § 101(a)(43)(M)(i).

The petitioner filed this petition for a writ of habeas corpus, arguing that the reduction in restitution changed his conviction and that it is no longer an "aggravated felony" for which he can be deported. The Court disagrees and denies the petition for a writ of habeas corpus.

To determine whether the amount ~~of~~ the loss to the victims is sufficient to create an aggravated felony as defined by 8 U.S.C. § 101(a)(43), the court must determine the amount of the loss to which the defendant pled guilty. See, e.g., Chang v. INS, 307 F.3d 1185 (9th Cir. 2002). This may be determined by looking at the loss amounts in the plea agreement or in the indictment. E.g., Chang, 307 F.3d at 1187-88 (determining loss from the amount contained in the plea agreement); Khalayleh v. INS, 287 F.3d 978, 980 (10th Cir. 2002) (determining loss from the amount alleged in the indictment).

The amount of restitution may be helpful to the court's inquiry ~~if~~ the plea agreement or the indictment is unclear as to the loss suffered; where, ~~however~~, the actual loss

is clear from the indictment or agreement, and that amount is different from the restitution amount, the restitution amount is irrelevant. See Chang, 307 F.3d at 1187-88 (court found that the amount to which the defendant plead guilty was "slightly over \$600.00" as stated in the plea agreement, not the restitution amount of \$32,628.27).

In this case, the indictment stated that the fraud involved caused a loss to the victim in excess of \$10,000.00. There is no evidence that the defendant pled guilty to any facts other than as alleged in the indictment. Based on this figure, the amount to which the defendant pled guilty is greater than \$10,000.00, and he is deportable under 8 U.S.C. § 101(a) (43)(M)(i).

Even if the amount of restitution were the decisive factor, the subsequent change to the amount of restitution is not sufficient to remove the petitioner's, conviction from the aggravated felony class. Pursuant to congressional mandate, rehabilitative statutes do not change an underlying conviction. Herrera-Iniria v. INS, 208 F.3d 299, 305-306 (1st Cir. 2000).

The court in Herrera-Iniria explained that a change in a conviction which results from something other than the merits of the conviction or a violation of the defendant's

constitutional rights does not have any bearing on the defendant's conviction for § 1101(a)(48)(A) purposes. Id. at 305.

The petitioner has not alleged that the reduction in his restitution was made because the merits of the case demanded it, or because he was the victim of a constitutional violation that required such a reduction. Instead, the new restitution amount indicates that the reduction was likely made to lower the amount below the \$10,000.00 threshold to avoid deportation.

As the court explained in Herrera-Iniria, Congress' motivation for providing a uniform definition of "conviction" in § 1101(a)(48) and for preventing the use of rehabilitative statutes to avoid deportation was to ensure uniform application **of** the deportation laws despite variances in state rehabilitative laws. Id. Even though the reduction in restitution in this case was not a result **of** the typical rehabilitation statute that expunges a conviction after a period of good behavior, the congressional purpose in preventing changes to deportation status due to rehabilitation still applies. Allowing an alien to avoid deportation based on a state law or **rule of** procedure allowing for a post-conviction reduction in the amount of restitution owed would frustrate uniform application of

the deportation laws as much any other rehabilitative statute.
The reduction of the petitioner's restitution under such
circumstances does not change the status of his conviction for §
1101 (a)(48) purposes.

An appropriate order follows.

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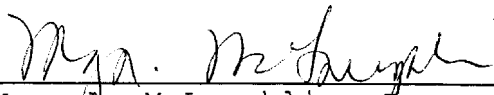
JOHN ASHCROFT, As Attorney
General of the United States
of America,

Respondent : NO. 02-2256

ORDER

And now, this 17th day of January, 2003, upon
consideration of the petitioner's petition for a writ of habeas
corpus (Docket #1), and all subsequent filings related thereto,
it is HEREBY ORDERED that the petition for a writ of habeas
corpus is DENIED for the reasons set forth in the memorandum of
today's date and no certificate of appealability is granted as
petitioner has not made a substantial showing of the denial of a
constitutional right.

BY THE COURT:


Mary A. McLaughlin, J.

Mailed 1/17/03:

P. Torres, usg.
S. Becker, usg.
J. Shuck, usg.
A. Cassell, usg.